REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 381 OF 2009

PAUL KABATI KAMAU..... APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

(From the original conviction and sentence in Criminal Case No. 80 of 2009 of the Senior Resident Magistrate's Court at Githunguri by Abdul Lorot – Senior Resident Magistrate)

JUDGMENT

The appellant, **PAUL KABATI KAMAU**, was convicted for the offence of Defilement of a girl **contrary to section 8 (1)** as read with **section 8 (2) of the Sexual Offences Act.**

The learned trial magistrate thereafter sentenced the appellant to Life imprisonment.

In his appeal, the appellant has raised 7 issues, which can be summarized as follows;

(a) The Constitutional Rights of the appellant were violated when he was held for 7 days before being taken to court.

(b) The medical evidence completely exonerated the appellant.

(c) The prosecution evidence had material discrepancies. It was also inconclusive and un-corroborated.

(d) The trial court failed to conduct the mandatory *voire dire* ***examination of the complainant.***

(e) The charge sheet was incurably defective.

(f) The case was not proved beyond any reasonable doubt.

(g) The defence was not considered.

When canvassing the appeal, the appellant pointed out that he was arrested on 13th January

2009. However, it was not until 21st January 2009 that he was first taken to court.

As the Constitution requires a suspect to be taken to court within 24 hours of arrest, the appellant submitted that the delay in taking him to court constituted a gross violation of his rights.

Therefore on the basis of the following 2 authorities, the appellant urged this court to quash his conviction;

(a) PAUL MWANGI MURUNGA VS REP. CRIMINAL

APPEAL NO. 35/2007; and
(a) ANN NJOGU & 5 OTHERS VS. REP. MISC. APPLICATION NO. 551/2007

The second issue raised by the appellant was in relation to the Expert Evidence tendered by the doctor. As the doctor found that the complainant had nothing abnormal in her genitalia, the appellant says that that evidence exonerated him

In any event, the spermatozoa allegedly found on the complainant's thighs was not tested, so as to prove that it emanated from the appellant. Therefore, he submitted that he was not linked to the offence committed on the complainant.

Meanwhile, the phrase **"Tabia Mbaya"** was said to be incapable of being understood to mean only that the complainant was defiled.

As the complainant did not testify, it cannot be said, so submitted the appellant, that when she gave to her mother the name of Paulo, she was referring to the appellant.

The complainant was said to be a very young child. Therefore, the appellant submits that the trial court should have conducted a *voive dire* examination before receiving her evidence.

As the trial court did not, in the opinion of the appellant, conduct a *voire dire* examination, the whole proceedings were rendered defective.
The charge sheet was also described as defective. The basis for that contention is that the charge was based on information that was obtained from a very young child who was not able to give evidence. The trial court held that the complainant's speech was under-developed. Therefore, the appellant believes that there is no way that the communication from such a child could form a reliable foundation for the evidence against him.
The appellant also expressed the view that the whole case was handled very casually. He believes that if the complainant was unable to communicate well when she was in open court, the learned trial magistrate should have taken her evidence in chambers.

Furthermore, the appellant believes that there should have been a DNA test conducted, to establish a nexus between him and the spermatozoa that was found on the complainant.

The trial court was faulted for shifting the burden of proof to the appellant. That submission stems from the trial court's comment about the failure by the appellant to raise some issues with the complainant's mother.

Finally, the appellant submitted that his defence was rejected for no cogent reason.
In answer to the appeal, Miss Maina, learned state counsel, submitted that the offence was proved beyond any reasonable doubt.

PW 1 examined the complainant when the young girl came up to her, crying, whilst holding her trouser in her hands. **PW 1** noted a whitish discharge on the complainant's thighs.

Thereafter, the doctor verified that the whitish discharge was spermatozoa.

The respondent also submitted that the appellant was recognized by the complainant, as he was an uncle to her; and because the incident took place in broad daylight.

I have re-evaluated all the evidence on record.

First, I note that the date of arrest is indicated on the charge sheet as 13th January 2009. The said charge sheet also cites the date of 21st January 2009, as the date when the appellant was first taken to court.

PW 3 was the arresting officer. He confirmed that the appellant was arrested on 13th January 2009. **PW 4** corroborated that piece of evidence.
However, the appellant did not ask them any questions when he was given the opportunity to cross-examine them. As a result, the trial court did not have the benefit of any explanation from the prosecution, for the delay in taking the appellant to court.

In so saying, I am not blaming the appellant for not raising the issue. I am simply stating a fact.

I do appreciate that the Court of Appeal has made it clear that it is the responsibility of the magistrate's court to make an enquiry from the prosecution for the reasons, if any, why an accused person was brought to court later than he ought to have been.

The charge sheets before the magistrate's courts usually have provision for the date of arrest and the date when an accused person was first taken to court. Therefore, it is possible for the presiding magistrate to tell, at a glance, that there was an apparent delay in taking an accused person to court.

In an ideal scenario the trial court would not even need to raise the issue. The prosecution would simply put forward its explanation for having brought an accused to court late.

In this instance, there is absolutely no explanation for the delay which appears obvious, on the face of the charge sheet. However, even if the un-explained delay could be deemed to constitute a violation of the appellant's constitutional rights, that could not earn him an acquittal. That position was made crystal clear by the Court of Appeal in **JULIUS KAMAU MBUGUA Vs REPUBLIC CRIMINAL APPEAL NO. 50 of 2008.** The case was decided on 8th October, 2010.

In the judgment, their Lordships carried out extensive research, which covered not only the jurisprudence available in Kenya but also jurisprudence in the Commonwealth and beyond.

After a logical analysis of the jurisprudence, the Court expressed itself thus;

"The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in Section 72 (b). **That is the appropriate remedy which the appellant should have sought in a different forum."**

The Court went further to say that a person who was taken to court late was entitled to damages, thus rendering incompetent his demand for his discharge.

Although the Court did not say that the remedy of an acquittal would also be incompetent, I believe that that is the correct position, in law. I say so because the earlier decisions, which the Court deviated from, had ordered the acquittal of persons who had been taken to court later than they should have been.

Meanwhile, as regards the need for *voire dire* examination of a witness who was a child of tender years, I note that the trial court did not record verbatim, the questions and answers between the court and the complainant.

However, it is clear from the record of the proceedings, that the learned trial magistrate was fully alive to the need for *voire dire* examination.

The reason why he did not record the *voire dire* examination is because the complainant did not say anything other than that the appellant herein was "Paulo".

As the complainant did not say anything else, the court could not have recorded something that was not spoken.

In any event, the complainant was excluded from the trial. She therefore did not testify at the appellant's trial.

As the complainant did not testify, there was no legal requirement for her to be taken through a *voire dire* examination.

Having given careful consideration to the evidence tendered, I found nothing that constituted any material contradictions or inconsistencies in the prosecution case.

I also found that the comment by learned trial magistrate, regarding the failure by the appellant to raise certain issues when he was cross-examining **PW 1**, did not constitute the shifting of the burden of proof to the appellant. It was a legitimate observation.

If an accused person has a genuine defence, ordinarily he would begin disclosing the said line of defence when he cross-examining the prosecution witnesses. For instance, if he alleges that he was framed by the complainant because of a grudge between them, which pre-dated the alleged offence; the accused would be expected to suggest to the complainant that he and the accused had some specified grudge between them.

By questioning the complainant about the issue, the accused will have given to the complainant an opportunity to comment on it.

That process would enable the trial court to weigh the response of the complainant against the defence which the accused will put forward later.

But if an accused person does not question prosecution witnesses in such a manner as to suggest his line of defence, the trial court may probably hold that the line of defence which was only raised, for the first time, when the accused was giving his defence, was an afterthought.

In this case, could the reference to "Paulo" mean anybody else other than the appellant? The appellant thinks so. But I do not share his said view.

The learned trial magistrate pointed at the appellant, and asked the complainant if she knew him. The complainant responded by saying that the appellant was "Paulo".

In those circumstances, the reference to "Paulo" was definitely in relation to the appellant, and nobody else.

In any event, as **PW 1** said, there was no other person named "Paulo" in the "compound" where the complainant's family lived.

Furthermore, when the complainant was telling her mother **(PW 1)** about Paulo having done "bad manners" to her, the complainant pointed at the appellant, who was standing outside his grandmother's house. The said house was 20 metres away from **PW 1's** house.

The reference to "Tabia Mbaya" or "Bad Manners", is not sufficient, of itself, to enable the court know what exactly had been done to the complainant.

For the court to appreciate that phrase, it must be corroborated with further evidence. For example, a complainant would point at her pubic area, to denote the part of her body that had been subjected to the said “Bad Manners”.

Another example would be corroboration through evidence that the complainant’s sexual organ had been injured.

In this case, there were spermatozoa on the thighs of the complainant. That evidence pointed at the nature of the “Tabia Mbaya” that was visited on the complainant.

In this case the learned trial magistrate fully appreciated the issue before him, when he was confronted with the medical evidence. This is what he said;

“The offence for which he is charged is defilement. I have considered the evidence of Dr. Ndolo that an attempt was made at penetration.”

The court went to restate the definition of “Defilement”, as contained in **section 8(1) of the Sexual Offences Act.**

It is clear that that offence is committed when the offender commits an act which causes penetration with a child.

In the case before me the trial court found no evidence of actual penetration. The genitalia was normal, with no lacerations. The hymen was intact.

In those circumstances, the court ought not to have convicted the appellant for the offence of Defilement. The evidence proved that the appellant had attempted to defile the complainant.

In the result, I set aside the conviction for the offence of Defilement, and instead substitute it with a conviction for the offence of Attempted Defilement.

I also set aside the life imprisonment. Instead, I now order that the appellant shall serve a sentence of 10 years imprisonment. The said sentence shall run from 28th August 2009, when the appellant was first sentenced.

Dated, Signed and Delivered at Nairobi this 15th day of February, 2012

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FRED A. OCHIENG
JUDGE